



BRB No. 15-0385 BLA

JO ANN ASHBY)	
(Widow of JAMES V. ASHBY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEXTET MINING CORPORATION)	
)	
and)	
)	
SECURITY INSURANCE OF HARTFORD)	DATE ISSUED: 05/09/2016
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Canceling Hearing of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Canceling Hearing (2014-BLA-5366) of Administrative Law Judge Timothy J. McGrath (the administrative law judge), rendered on a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant filed her survivor's claim on June 24, 2013. Director's Exhibit 7. On June 28, 2013, the district director issued a Proposed Decision and Order, finding that claimant was derivatively entitled to benefits pursuant to Section 422(l) of the Act, 30 U.S.C. Section 932(l)(2012).² Director's Exhibit 17. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 18, 24.

¹ Claimant is the widow of the miner, who died on March 27, 2013. Director's Exhibit 9. The miner filed his third claim for benefits on February 27, 2006, and on February 11, 2008, Administrative Law Judge Daniel F. Solomon awarded benefits. Upon employer's appeal, the Board remanded the case for further findings. *Ashby v. Sextet Mining Corp.*, BRB No. 08-0434 BLA (Mar. 24, 2009) (unpub.). On December 3, 2009, Judge Solomon issued a Decision and Order on Remand awarding benefits. Upon employer's appeal, the Board again remanded the case for further findings. *Ashby v. Sextet Mining Corp.*, BRB No. 10-0283 BLA (Jan. 26, 2011)(unpub.). On December 20, 2011, Judge Solomon issued a Decision and Order on Second Remand awarding benefits. Director's Exhibit LM 3-71. Employer appealed the decision, but then filed a request for modification. Director's Exhibits LM 3-72, 73. On March 29, 2012, the Board dismissed employer's appeal and remanded the case to the district director for modification proceedings. *Ashby v. Sextet Mining Corp.*, BRB No. 12-0205 BLA (Mar. 29, 2012)(Order)(unpub.); Director's Exhibit LM 3-76. On March 5, 2012, the district director informed employer that he was not empowered to make a mistake in fact determination, Director's Exhibit LM 3-74, and on February 28, 2013, the district director found the evidence insufficient to establish a change in conditions since Judge Solomon's award of benefits on December 20, 2011. Director's Exhibit LM 3-86. The district director forwarded the case to the Office of Administrative Law Judges for hearing, and the case is currently pending. Director's Exhibit LM 3-88.

² Section 422(l) of the Act, 30 U.S.C. §932(l)(2012), provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

On May 5, 2015, claimant filed a Motion for Summary Judgment with the administrative law judge in this case, asserting that, under Section 932(l), and given the filing date of her claim, she was entitled to benefits based on the award to her deceased husband. In response, employer maintained that claimant is not automatically entitled to survivor's benefits because the miner was not receiving benefits pursuant to a final and effective award of benefits, and that there are genuine issues of material fact in the miner's claim and in the survivor's claim.³ The Director, Office of Workers' Compensation Programs (the Director), did not file a response to claimant's motion. Claimant filed a reply to employer's response, reiterating the basis for her motion.

In his Decision and Order, the administrative law judge found: that employer is the properly designated responsible operator; that claimant is an eligible survivor of a miner who was entitled to benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; and that her claim was pending on or after March 23, 2010. As employer did not contest these issues in its response to claimant's motion for summary judgment, the administrative law judge found that there were no genuine issues of material fact concerning claimant's entitlement to benefits under Section 932(l). Relying on the Board's holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-142 (2014), the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to Section 932(l), based on the award to her deceased husband, even though the award of benefits in the underlying miner's claim is not yet final. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's application of Section 932(l) to this case. Claimant responds in support of the award of benefits. The Director responds, urging the Board to affirm the award of benefits. Employer has filed a reply brief in support of its position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

³ With regard to this survivor's claim, employer argued that the issues in dispute are the existence of pneumoconiosis, disease causality, and death causation. Employer's Response to Motion for Summary Judgment at 3.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit LM 1-5.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer’s contention that application of Section 932(l) is unconstitutional, as a violation of employer’s due process rights and as an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer challenges the automatic entitlement provision applicable to a surviving spouse under Section 932(l), arguing that “the Act does not grant benefits to widows of miners whose deaths were not caused or hastened by pneumoconiosis, 30 U.S.C. §901(a),” and that “30 U.S.C. §932(l) merely relieves eligible survivors from being required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.” Employer’s Brief at 5-7. Employer relies on arguments that have been rejected by the United States Court of Appeals for the Sixth Circuit in *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013). *See also McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 945-46, 25 BLR 2-249, 2-253 (6th Cir. 2013). For the reasons set forth in *Dotson* and *Groves*, we reject employer’s arguments in this case.

Employer next challenges the administrative law judge’s finding that claimant is derivatively entitled to survivor’s benefits under Section 932(l), arguing that the miner was not receiving benefits pursuant to a final and effective award and that there are genuine issues of material fact in controversy. Employer requests that the Board reconsider its decision in *Rothwell*, and further requests that this case be remanded to the Office of Administrative Law Judges to be consolidated with the miner’s pending claim. Employer’s Brief at 3-5.

Contrary to employer’s arguments, Section 932(l) requires only that a miner be “determined to be eligible to receive benefits . . . at the time of his . . . death.” 30 U.S.C. §932(l). As the Director accurately notes, the Board’s decision in *Rothwell* made it clear that, for purposes of determining eligibility for derivative benefits under Section 932(l), the award in the miner’s claim need not be final or effective:

[U]pon an award of benefits at any stage of a black lung proceeding, a miner is legally entitled to receive benefits from either the responsible operator or the [Black Lung Disability] Trust Fund, regardless of an appeal, or a request for modification, of the award. Therefore, we agree with the Director that miners who are entitled to receive benefits payments under the regulations, even before their awards are final, are necessarily “determined to be eligible to receive benefits” 30 U.S.C. §932(l).

Rothwell, 25 BLR at 1-146.

In *Rothwell*, the Board recognized that, even where a responsible operator requests modification of an award of benefits in a miner's claim, the miner is entitled to receive benefits paid by the employer or, in the event of the employer's default, by the Black Lung Disability Trust Fund. *Rothwell*, 25 BLR at 1-146 n. 6, citing 20 C.F.R. §§725.420(a), 725.522(a). We, therefore, reject employer's argument that automatic entitlement is not applicable in a survivor's claim, absent a final award of benefits in the miner's claim. Furthermore, contrary to employer's contention, the administrative law judge correctly found no genuine issues of material fact concerning claimant's entitlement to benefits,⁵ as Section 932(l) automatically provides benefits to an eligible survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 249, 25 BLR 2-13, 2-37 (3d Cir. 2011); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Because the miner in this case was "determined to be eligible to receive benefits" for the purpose of determining eligibility for derivative benefits under Section 932(l), we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l). 30 U.S.C. §932(l).

⁵ Employer does not dispute that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that the miner was determined to be eligible to receive benefits at the time of his death. Moreover, while employer marked the issue of eligible survivor on Form CM-1025 as a contested issue, the administrative law judge correctly noted that there are no issues of eligibility in this case, as employer did not dispute that claimant is an eligible survivor in its response to claimant's motion for summary judgment. Decision and Order at 4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Canceling Hearing is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge